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No. 83-359

In the Supreme Court of the United States

OCTOBER TERM, 1983

YAVAPAI-PRESCOTT INDIAN TRIBE, PETITIONER

v.

SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of the Interior has the exclusive authority under 25 C.F.R. 162.14 to terminate leases of Indian trust land entered into pursuant to 25 U.S.C. (& Supp. V) 415.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 707 F.2d 1072. The opinion of the district court (Pet. App. B1-B6) is reported at 528 F. Supp. 695.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1983. The petition for a writ of certiorari was filed on September 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

25 U.S.C. (& Supp. V) 415 and 25 C.F.R. 162.14 are reproduced in pertinent part at Pet. 2-3.

STATEMENT

1. On September 11, 1969, the Superintendent of the Truxton Canyon Agency of the Bureau of Indian Affairs (BIA) approved a lease which had been entered into by the Yavapai-Prescott Community Association[1] with respondent Kuykendall for a tract of trust land on the Yavapai-Prescott Indian Reservation[2] in Prescott, Arizona. The land was to be used for an automobile agency. The lease incorporates by reference 25 C.F.R. Pt. 131 (now 25 C.F.R. Pt. 162), which subjects the leasing of Indian lands to regulation by the Secretary of the Interior. Article 30 of the lease provides that Kuykendall is to be permitted to cure any claimed breach of the lease and that the Tribe "and/or" the Secretary may sue for monies due or terminate the lease in the event of an uncured breach. Article 19 of the lease prohibits Kuykendall from subleasing the property without the prior written approval of the Tribe and the Secretary and provides that failure to obtain such approval of a sublease would be deemed a breach of the lease. Pet. App. A2-A3, B2, C1-C2.

In March 1979, Kuykendall entered into an agreement with a partnership, Smith and Henkel, for the sale of his automobile dealership and the sublease of the premises. The Tribe disapproved the sublease, notified Kuykendall that he was in breach of the lease, and requested that he cure the breach by retaking the premises himself. When this was not done, Kuykendall was informed by the Tribe on June 27, 1979, that his lease was terminated. The Secretary did not

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[1]The association is treated as a Indian tribal government by the BIA. 45 Fed. Reg. 27828 (1980).

[2]Congress transferred 75 acres of land to the Secretary of the Interior in trust for the Yavapai Indians by the Act of June 7, 1935, ch. 202, 49 Stat. 332. Congress transferred an additional 1,320 acres to the Secretary in trust for the Yavapais by the Act of May 18, 1956, ch. 279, 70 Stat. 157.

participate in or approve the cancellation. Pet. App. A3, B2, C2-C3.

2. In August 1979, Kuykendall requested that the Area Director of the BIA intervene to prevent the Tribe from cancelling the lease. He refused, ruling that the Tribe had the authority to cancel the lease. Pet. App. B2-B3, C3. On September 20, 1979, the Tribe approved a Law and Order Code, under which a Tribal Court was established. Section 2.1 of the Code provided that the Tribal Court had exclusive jurisdiction of all suits between the Tribe and any person arising out of the lease of property on the Yavapai Reservation, but that jurisdiction over non-Indians in all other civil matters would attach only if the non-Indian litigant submitted himself to the jurisdiction of the court by written stipulation or by filing an action in the court. The Tribal Code was approved by the Truxton Canyon Agency Superintendent on the day it was adopted by the Tribe. Pet. App. C3, D1.

Shortly thereafter, Smith and Henkel filed an action in the Tribal Court seeking a declaratory judgment adjudicating its rights in the sublease. Kuykendall refused to appear, challenging the jurisdiction of the court. Finding Kuykendall in default, the Tribal Court ordered the improvements on the land forfeited and nullified the sublease, holding the possessory right of Smith and Henkel to depend on the will of the Tribe. Pet. App. C3-C4.

3. Kuykendall took an administrative appeal to the Interior Board of Indian Appeals, pursuant to 25 C.F.R. 2.19, from the BIA Area Director's decision not to intervene in the cancellation of the lease. The Board reversed the Area Director, concluding in a formal opinion that the Tribe had no power to terminate the lease without the approval of the Secretary (Pet. App. C1-C12). The Board held that, in light of the general tenor of the lease as a whole, Clause 30 could

not be read to grant the Tribe the unilateral authority to cancel the lease. The Board explained that the Secretary had certain fiduciary duties to the Tribe set out in 25 U.S.C. (& Supp. V) 415, implementing regulations, and case law that had not been waived by the lease's termination provision and had previously been carried out by the Secretary in the administration of the lease. In the Board's view, the phrase "and/or" in Clause 30 of the lease, while awkward, merely described the alternative actions that are jointly available to the Secretary and the Tribe and did not confer a unilateral power of termination on the Tribe. Pet. App. C9-C10. The Board also concluded that even if the Superintendent had intended when he approved Clause 30 of the lease to grant termination authority to the Tribe, he was prevented from doing so by the binding effect of 25 C.F.R. 162.14.[3] Nor did the Board find this conclusion altered by the decision of the Tribal Court, because the Tribal Court could not override the final authority of the Secretary with respect to cancellation. The matter accordingly was remanded by the Board to the Area Director for further administration of the lease, including consideration of any question pertaining to cancellation. Pet. App. C10-C12.

4. The Tribe sought judicial review of the Board's decision in the United States District Court for the District of Arizona. In an opinion dated December 21, 1981 (Pet. App. B1-B6), the district court reversed the Board. The court held that, although 25 U.S.C. (& Supp. V) 415 grants the Secretary broad power with regard to the leasing of Indian lands, it did not give him exclusive power to terminate leases. Furthermore, the court believed that while 25 C.F.R. 162.14 set out a procedure by which the Secretary could

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[3]Under 25 C.F.R. 1.2, the Secretary has reserved the power to waive the provisions of a regulation if he determines that it would be in the best interests of the Tribe, but we have been informed by the Department of the Interior that this power to waive applicable regulations has not been delegated to Superintendents of Indian Agencies.

terminate a lease, the regulation did not purport to state the exclusive means of termination. Finally, the court held that by approving Clause 30 of the lease, the Secretary either had confirmed that the Tribe had independent power to terminate the lease or had intended to supersede the regulation. Pet. App. B3-B6.

5. Respondent Kuykendall appealed to the United States Court of Appeals for the Ninth Circuit, and the court of appeals reversed (Pet. App. A1-A8). The court of appeals determined that the question whether the exclusive means for termination of a lease was set out in 25 C.F.R. 162.14 depended on whether granting the Tribe unilateral power of termination would serve the purpose intended by Congress in enacting 25 U.S.C. (& Supp. V) 415 — the enhancement of the profitable development of Indian land (Pet. App. A5). The court observed that to grant the Tribe such power would enhance the Tribe's control of lease provisions but increase the risk that leases would not serve the long-run interests of the Tribe. The court also noted that the Secretary, in the exercise of his power under Section 415, could determine in any event who would have the power of termination. For this reason, the court believed it most consistent with the judicial function to accept the Secretary's present determination, reflected in the Board's decision, that the final authority on this point resided with the Secretary under existing regulations. Pet. App. A5-A6.

The court of appeals also identified several additional considerations to support its holding. First, it noted that to find that the Tribe had a unilateral power of termination would create the possibility of an impasse between the Secretary and the Tribe. Second, the court believed that to give the Tribe unilateral termination authority would tend to depress the value of Indian leases. Finally, the court was not persuaded to abandon its approach merely because of

the "and/or" language in Clause 30, finding the issue too important to turn on such an awkward reference. Pet. App. A7-A8.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Indeed, the question of the interpretation of the regulation governing cancellation of leases is one of first impression. Further review by this Court of the application of that regulation to the terms of the particular lease at issue is not warranted.

1. Petitioner concedes (Pet. 6) that the lease in question is governed by 25 U.S.C. (& Supp. V) 415, which requires that leases of Indian land be approved by the Secretary of the Interior and "be made under such terms and regulations as may be prescribed by the Secretary of the Interior." Pursuant to the quoted authority, the Secretary has promulgated a regulation governing the cancellation of leases. Under that regulation, as the Tribe further concedes (Pet. 6, 9), the Secretary is vested with the final authority to determine whether the lease should be cancelled. 25 C.F.R. 162.14. The Board, on behalf of the Secretary, construed the regulation to prescribe the *exclusive* method for terminating a lease entered into pursuant to 25 U.S.C. (& Supp. V) 415. The Secretary's interpretation of his own regulation is entitled to substantial deference. *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). That construction, moreover, is sound. Because the Secretary must approve a lease in the first place, it is only logical that he would preserve the ultimate power to approve a termination, in order to protect the Indian owner against an improvident decision that could diminish the value of the land. In *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365 (1968), which involved a similar statutory and regulatory scheme for the leasing of Indian lands, the Court sustained the power of the Indian owner to sue for

breach of the lease, but recognized the authority of the Secretary under applicable regulations to impose the more "severe" remedy of termination. 390 U.S. at 374.[4] See also *Jicarilla Apache Tribe* v. *Supron Energy Corp.*, 479 F. Supp. 536, 553 (D. N.M. 1979). Cf. *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1332-1335 (10th Cir. 1982). There is no reason for a different result here.

The lease termination provisions now set forth in 25 C.F.R. 162.14 were first promulgated in 1964 (29 Fed. Reg. 2542), and they have been in effect ever since. Congress has amended Section 415 numerous times since then,[5] but has never limited the Secretary's termination authority set forth in the regulation. Thus, if 25 U.S.C. (& Supp. V) 415 does not itself require that the Secretary have final authority over lease terminations, this congressional action and inaction strongly support the conclusion that the Secretary acted well within his statutory authority by preserving that authority in the regulations he is expressly authorized by Section 415 to promulgate. *Haig* v. *Agee*, 453 U.S. 280, 290-291, 298-301 (1981); *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974). This conclusion is bolstered by the fact that, in practice, it has been the Secretary who has effectuated the

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[4]The Tribe's assertion (Pet. 12-13) that the decision below is inconsistent with *Poafpybitty* therefore is without merit.

[5]See Pub. L. No. 89-408, 80 Stat. 132; Pub. L. No. 90-182, 81 Stat. 559; Pub. L. No. 90-184, 81 Stat. 560; Pub. L. No. 90-335, § 1(f), 82 Stat. 175; Pub. L. No. 90-355, 82 Stat. 242;Pub. L. No. 90-534, § 6, 82 Stat. 884; Pub. L. No. 90-570, 82 Stat. 1003; Pub. L. No. 91-274, §§ 2, 3, 84 Stat. 302; Pub. L. No. 91-275. §§ 1, 2, 84 Stat. 303; Pub. L. No. 91-558, § 8, 84 Stat. 1468; Pub. L. No. 92-182, § 6, 85 Stat. 626; Pub. L. No. 92-431, 86 Stat. 723; Pub. L. No. 92-472, § 7, 86 Stat. 788; Pub. L. No. 92-488, § 4, 86 Stat. 806; Pub. L. No. 96-216, 94 Stat. 125; Pub. L. No. 96-491, § 3, 94 Stat. 2564.

termination of leases of Indian lands.[6] This has been true even where, as here, the lease itself allows the Indian lessor to make such termination without mentioning the Secretary's approval authority. See *Vallerto* v. *Patencio*, 2 I.B.I.A. 140 (1974). Moreover, as the Tribe freely admits (Pet. 11-12), the Secretary's decision whether to approve a lease is committed to his discretion, once he has satisfied himself that certain criteria set out in 25 U.S.C. (& Supp. V) 415 have been met. Thus, the Secretary simply could refuse to approve a lease that did not grant him termination authority, thereby creating an impasse with a Tribe that insisted upon having that authority. For these reasons, the Secretary's interpretation of the regulations is entirely reasonable.

2. The Tribe contends (Pet. 4 n.1, 6, 12, 17), however, that language in the lease itself grants it the authority to terminate the lease without Secretarial approval. But as the Tribe concedes (Pet. 3-4), if the lease were construed in that manner, it would conflict with the regulation discussed above that explicitly vests final authority in the Secretary to approve terminations. Agencies ordinarily are bound by their own regulations (*Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954)), and there is a substantial question here whether the unauthorized approval of a lease inconsistent with the regulations could bind the Secretary. See, *e.g.*, *United States* v. *California*, 332 U.S. 19, 39-40 (1947); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947); *Sanitary District* v. *United States*, 266 U.S.

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[6]See *Small* v. *Commissioner*, 8 I.B.I.A. 18 (1980); *Karlen* v. *Commissioner*, 6 I.B.I.A. 181 (1977); *Vieau* v. *Commissioner*, 6 I.B.I.A. 150 (1977); *Brown* v. *Albuquerque Area Director*, 5 I.B.I.A. 155 (1976); *Pankratz* v. *Superintendent, Fort Belknap Agency*, 4 I.B.I.A. 231 (1975); *Sunny Cove Development Corp.* v. *Cruz*, 3 I.B.I.A. 33 (1974); *Sessions, Inc.* v. *Ortner*, 3 I.B.I.A. 145 (1974).

405, 427 (1925); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917). Especially against this background, the court of appeals and Board correctly construed the phrase "and/or" in Clause 30 of the lease not to confer on the Tribe a unilateral power of termination. Pet. App. A7-A8, C5-C10.

As the Board pointed out (Pet. App. C9 & n. 12), the lease generally gives final approval authority in *all* matters relating to the administration of the lease to the Secretary. Therefore, to assume that what the court of appeals and Board termed the "awkward" phraseology in Clause 30 (Pet. App. A8, C9) leaves an administrative matter of such importance as termination within the sole discretion of the Tribe is inconsistent with the general tenor of that document. The language "and/or" in question instead reasonably should be read to confer the power of termination on the Tribe and the Secretary acting together or on the Secretary acting alone. The interpretation of the lease adopted by the court of appeals is, as that court noted (Pet. App A6), the one chosen by the Secretary, the official responsible for its contents, and therefore should be shown great deference by the courts. *Udall* v. *Tallman, supra*. There is, accordingly, no reason for this Court to review that construction.

3. Contrary to the Tribe's assertions (Pet. 6-7, 8-9, 13, 18), this result is in no way inconsistent with accepted principles of tribal sovereignty. That sovereignty always is subordinate to the power of Congress (see, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980)), and the court of appeals in this case simply construed a regulation issued pursuant to an Act of Congress to require Secretarial consent to the termination of a lease that the Secretary had approved in the first place. In view of the pervasive federal control over transactions involving Indian property (*e.g.*, 25 U.S.C. 177), this holding cannot be regarded as a departure from usual practices. Nor

does the decision below call into question the general authority of tribal courts, as the Tribe also maintains (Pet. 6-7, 13-15). The decision below does not undermine the jurisdiction of the Tribal Court to adjudicate disputes concerning leased property — *e.g.*, in a suit for damages for violation of the lease. The court of appeals held only that the Tribal Court is bound by, and therefore cannot excuse compliance with, the regulation requiring Secretarial approval of the termination of a lease. The Tribe is not, of course, without remedy for violations of leases of its land. As this Court held in *Poafpybitty*, the Tribe may seek remedies for breach in court. Furthermore, it may still seek approval of the cancellation of the lease from the Secretary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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